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No. 91-194

IN THE

Supreme Court of the United States

October Term 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
by and through its Tax Commissioner,
HEIDI HEITKAMP,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

BRIEF OF *AMICI CURIAE* MAGAZINE PUBLISHERS OF AMERICA, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. and CLASSROOM PUBLISHERS ASSOCIATION, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amicus Magazine Publishers of America, Inc. (MPA) is a national trade association incorporated under the laws of the State of New York. Its members include 235 publishing firms that publish 1,193 consumer interest magazines. MPA members' publications include mass-circulation weeklies, monthly home and fashion magazines, journals of opinion, non-profit publications, and a wide variety of special interest publications. These magazines are circulated to about 100 million paid subscribers.

Amicus Association of American Publishers is the principal trade association representing book publishers in the United States. Its 230 members include publishers of popular trade and mass market books, mail order and book club publishers, publishers of educational texts and commercial and non-profit publishers of specialized professional, scientific and technical books, treatises and journals. The book publishing industry in the United States has a total sales volume of approximately $15 billion per year.

Amicus American Association of University Presses is a trade organization of 104 members, representing nationally-recognized university presses and nonprofit publishers such as the American Chemical Society and the National Academy of Sciences. The publishing activities of the 104 members focus upon a broad range of scholarly non-fictional and educational works and special interest fictional publications.

Amicus Classroom Publishers Association (CPA) is a group of publishers who produce classroom periodicals, teaching aids, kits and books, and religious school materials. These materials are utilized in public schools, parochial schools, and religious instruction classes. CPA members mail 30 million copies of classroom and religious school periodicals bi-weekly to pupils, teachers, Sunday schools, and school boards. These materials are used in social studies, religion, current affairs, civics, citizenship, language arts, science, homemaking, health, and physical education classes, and a variety of other subject areas. Over the last 50 years, approximately 18 billion copies of these materials have been distributed to students in this country.

These *amici* (Publishers) solicit and fulfill subscriptions and other sales throughout the United States, primarily through use of the Postal Service. A portion of circulation is delivered to retail outlets by common carriers. Although book publishers rely more extensively upon retail sales, a very significant pro-

portion of books — including virtually all professional, scientific and technical publications — are sold on a direct-to-consumer basis through the Postal Service and alternative delivery systems. To our knowledge, none of the *amici's* members publish any magazine, own any property, have any employees, or otherwise maintain any actual "physical presence" in North Dakota.

Should this Court adopt the "economic presence" theory proposed by the court below, or otherwise modify the rule in *Bella Hess*, publishers would be required to collect and remit (or simply pay) the North Dakota use tax on North Dakota subscriptions and sales, as well as other sales and use taxes in thousands of taxing jurisdictions throughout the United States where the publishers' sole connection is through the use of the United States Government's postal system and common carriers. This action would impose an unprecedented, unjustified, costly, and difficult burden upon them — a burden which, up to this time, this Court has found to be an unconstitutional denial of due process of law.

SUMMARY OF ARGUMENT

National Bellas Hess, Inc. v. Department of Revenue, 386 US 753 (1967) established the simple rule that a State may not tax an out-of-state enterprise whose *only* connection with the State is through use of the mails and common carriers. The rule is the essence of simplicity: its application avoids substantive analysis of a seller's activities; there is no need to weigh the seller's economic impact in the State, no counting of salesmen, no untangling of taxable and non-taxable sales. Since this Court established the rule in 1967, it has been consistently followed by this Court as well as lower Federal and State courts.

In this case, *State of North Dakota v. Quill*, 470 N.W. 2d 203 (1991), the Supreme Court of North Dakota has redefined an out-of-state enterprise's nexus, or "sufficient connection" with the State to be an "economic presence," measured solely by how often the seller advertises. North Dakota asserts that its definition is superior to this Court's long standing "physical presence" test used to determine a seller's responsibility to collect or pay taxes on interstate sales. Under North Dakota's new rule, there is "sufficient nexus" if a mailer distributes *any* form of advertising — mail, flyers, radio or TV commercials — three times in a twelve month period. The North Dakota court's decision would replace a well-established, consistently followed, clear and objective standard with an approach that inflicts draconian damage on small publishers and imposes a heavy burden of compliance on other enterprises that make interstate sales. Spread to other States, the rule could require substantive analysis to weigh "economic presence," an analysis that would undoubtedly vary according to how each State, or taxing jurisdiction within a State, chose to define "economic presence." The results would be chaotic.

There is no justification for the change. Although the figures for sales and revenues have changed as a result of the growth of the nation's economy and the expansion of direct marketing, the "exclusively interstate character" that this Court found in *Bellas Hess* remains intact. Petitioner Quill has no physical presence in North Dakota, and North Dakota provides no "services" to Quill, as that term is ordinarily understood. That test of due process, now applied as the first criterion of *Complete Auto Transit, Inc. v. Brady*, 430 US 274 (1977), should be reaffirmed unless this Court determines that states may tax all commerce that by any means crosses State lines. We believe that a fair reading of the Due Process Clause and the Commerce Clause prohibits such a result.

If the States' powers to tax interstate commerce are to be radically changed, as Quill proposes, Congress is the appropriate body to undertake the task, not the judiciary or fifty State legislatures. Exercising its broad powers under the Commerce Clause, Congress is in a far superior position to balance the multiplicity of issues and equities in this complex field. That Congress has considered but not enacted such legislation on several occasions suggests that the Federal legislature is satisfied with the results under *Bellas Hess*.

The decision below should be reversed.

ARGUMENT

I. *BELLAS HESS* SETS FORTH A CLEAR, EASILY ADMINISTERED RULE OF LAW. COMBINED WITH THIS COURT'S "FOUR-PRONG" TEST IN *COMPLETE AUTO*, IT BALANCES THE INTERESTS OF COMPENSATING STATES FOR SERVICES PROVIDED, WHILE PROTECTING FROM UNJUST TAXATION THOSE WHO RECEIVE NO SERVICES.

Bellas Hess differs from a long line of cases often described by this Court as "the perennial problem of the validity of a state tax" on interstate commerce. *Bellas Hess* presents no intricacy for analysis beyond determining whether the seller has a connection with the State beyond the use of interstate communications — the Postal Service and common carriers in *Bellas Hess* — that justifies allowing the State to tax the interstate sale. If the seller has no such connection, no "physical presence," as this Court has consistently required, the State may not require the seller to collect or pay the tax.

Bellas Hess became the first of the four-part test set forth

in *Complete Auto* to determine the validity of State taxes under the Commerce Clause. To meet *Complete Auto* requirements, a State tax must (1) be applied to an activity with a substantial nexus with the State, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the State. *Bellas Hess* is cited often as precedent and has served as the touchstone for comparison in several Supreme Court cases. The Court has found either "sufficient nexus" or "nexus aplenty" to distinguish *Bellas Hess*, but in each case where nexus was found, the seller maintained an actual physical presence in the State — an agent, a salesman, or an office where the tax collector could go and knock on the door.

In *Quill*, that is not possible: the seller has no presence, and derives no discernible benefit from the services that the State of North Dakota provides its citizens and business enterprises. While both Justice Fortas, writing for the dissent in *Bellas Hess*, and North Dakota, here, contend that out-of-state sellers benefit from "facilities nurtured by" the State, *Bellas Hess*, *supra*, 763, or a "trained work force," *Quill*, 31 (slip opinion), erasing State lines on the basis of such universal generalities would make both due process and Congress's exclusive power over interstate commerce virtually meaningless. It is a long way from the requirement of "physical presence" to the notion that, in our highly mobile American society, a California publisher must collect a Pennsylvania use tax from a mail-order subscriber in Philadelphia who was educated in Kansas and works in New Jersey because of the services Pennsylvania provides the *publisher*. Illinois advanced that argument in 1967, and with limitations, the dissent endorsed it. The majority did not. Instead, the majority found that such a seller's activities were "exclusively interstate in character" and drew a "bright line" to prevent unjustified state taxation of out-of-state enterprises.

The rule has been applied for almost a quarter of a century. During that time, this Court has permitted taxation where the seller has some "physical presence" in the taxing State, such as a single employee, *Standard Pressed Steel Co. v. Washington Revenue Department*, 419 US 560 (1975); a sales office, *National Geographic Society v. California Board of Equalization*, 430 US 551 (1977); or retail stores, *D.H. Holmes Co. v. McNamara*, 486 US 24 (1988).

In distinguishing *Bellas Hess*, this Court has frequently confirmed the rule. In *National Geographic*, the Court described the "sharp distinction" between the seller in *Bellas Hess* and in the Society, which maintained a sales office in California, and was therefore held responsible for the tax. The Court went further, and stated that it was not "implying acceptance" of the California Supreme Court's "slightest connection" standard of constitutional nexus; instead, the Court described the Society's sales office as "a much more substantial presence than the expression 'slightest presence' connotes." *National Geographic*, *supra*, 556.

The North Dakota court reads *National Geographic* to indicate that "a lesser showing of nexus may suffice" *Quill*, 15; it then adopts such a lesser standard, similar to the "slightest connection" California standard previously rejected by this Court. *National Geographic* suggested no such lesser standard; it requires the same constitutional standard described in *Bellas Hess* — physical presence. Bellas Hess had no office; National Geographic did.

In *Goldberg v. Sweet*, 488 US 252 (1989), the Court compared the "termination of an interstate telephone call" to the "receipt of mail" in *Bellas Hess*, and found both "insufficient nexus". *Ibid.*, 263. In *Holmes*, *supra*, this Court found "little similarity" between the activities of Holmes and National Bellas Hess. It is interesting to note, however, that in claim-

ing *Holmes* as a precedent for its new definition of nexus, the Supreme Court of North Dakota emphasized that this Court "chose to stress the economic presence" of Holmes in Louisiana. *Quill*, 16. The lower court's reading of *Holmes* is strained, if not disingenuous. In holding Holmes responsible to pay the tax, this Court listed — in the opinion's second paragraph — Holmes's extensive *physical* presence in Louisiana, including "13 department stores in various locations throughout Louisiana that employ about 5,000 workers." *Holmes, supra*, 26. Holmes's "economic presence" was not the result of mail order sales, but a statewide retail sales operation to which the mailing of catalogs was complementary.

North Dakota argues that "tremendous social, economic, commercial and legal innovations" since 1967 render *Bellas Hess* an "obsolescent precedent." While North Dakota may smart from having been "chided" by this Court for failing to detect changes in the law, *Quill*, 9, this Court's admonitions to lower courts should not be considered licenses to hunt. There is no sunset provision for this Court's interpretations of the Constitution except by Amendment or as prescribed by this Court.

This Court was fully cognizant of the size and activities of the mail order industry in 1967, and described it in detail. Mail order sales were then a significant marketing enterprise and this Court surely realized that the industry would grow. The argument was not about the *size* of the activity, but where the Due Process Clause drew the line to prohibit a State from taxing an out-of-state seller who made sales in the State. This Court made that distinction clear:

> In order to uphold the power of Illinois to impose use tax burdens. . ., we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with

> retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier. . . . But this basic distinction. . . is a valid one, and we decline to obliterate it. *Bellas Hess, supra*, 758.

Today, the numbers are greater; the means of purely interstate communication are more sophisticated. Sales orders that in 1967 were mailed may now be, and commonly are, delivered by interstate telephone calls, computers, and facsimilie machines. But the principle remains the same: the seller has no physical presence in the State justifying the State's interference with interstate commerce.

The rule in *Bellas Hess* is well established, simple to apply and, for a quarter of a century, heavily relied upon by publishers and many other interstate sellers to be the law of the land. It should be reaffirmed.

II. THE RULE PROPOSED BY THE COURT BELOW WOULD CREATE MULTIPLE STANDARDS FOR DETERMINING NEXUS AMONG THE STATES, INCREASE THE COMPLEXITY OF COMPLIANCE, AND UNFAIRLY BURDEN OUT-OF-STATE PUBLISHERS.

In describing what he and Justice Rehnquist perceived to be rules "too finespun and far too gossamer", Justice Blackmun wrote:

> They fail to provide what taxpayers and the lawyers who advise them have a right to expect, namely, a firm and solid basis of differentiation between that which runs afoul of the Commerce Clause, and that which is consistent with the clause. *Colonial Pipeline Co. v. Traigle*, 421 US 100, 115 (1975).

North Dakota's new rule for determining nexus personifies this failure. In North Dakota, a seller is deemed to be engaged in "regular or systematic solicitation" of customers if he makes "three or more separate transmittances of any advertisement" during a twelve month period. § 57-40.2-01(6), N.D. Cent. Code (Supp. 1989); §81-04.1-01-03.1(3), North Dakota Administrative Code. But North Dakota makes no distinction between the seller who saturates the State with weekly mailings and the smaller enterprise whose activities are, as the dissent in *Bellas Hess* recognized without hesitation, "a necessary constitutional consequence where the sales are occasional, minor and sporadic. . . [which] should be exempt from state use tax. . . . " *Bellas Hess, supra*, 763. Although obviously riveted by that portion of the dissent that supports North Dakota's new rule, the court below ignored the dissent's insistence on equitable distinctions. Unfortunately, the dissent did not formulate the judicial methodology for making such distinctions. But clearly, without them the demand of the Due Process Clause as applied in *Complete Auto* — that taxes be fairly related to the services provided by the State — cannot be met. If the lower court's concept of nexus prevails, publishers would be required to comply with different requirements in every State, and, in many States, taxing jurisdictions within the State. Today, more than 6,000 state and local jurisdictions have sales taxing authority.

The bright line of *Bellas Hess* beckons again to avoid the administrative labyrinth of differing State requirements, rates, exemptions, and exceptions that the court below would have.

For publishers, the problem is uniquely difficult. It is a universal practice in the publishing industry to include subscription order forms and announcements of new publications inside the publications mailed to subscribers and sold at retail outlets. This long-standing practice not only encourages

renewals and new subscribers, but reduces the costs of solicitation. Publishers of literary and opinion journals that derive little revenue from advertising rely heavily on this practice to reduce circulation costs yet still reach their audience. *Commonweal*, a Catholic publication devoted to public affairs, religion, and literature, includes such cards in their bi-weekly issues sent to 18,500 subscribers, 52 of whom live in North Dakota — 28/100ths of one percent of its circulation. *National Review* encloses cards in each bi-weekly issue to 150,000 subscribers across the nation, including 255 subscribers in North Dakota. *The New Republic* encloses cards in its 105,000 weekly copies mailed to subscribers, 130 residing in North Dakota. Under North Dakota's use tax law, these publications "regularly and systematically" solicit business in the State and would be required to collect and remit the North Dakota tax.

As a matter of Federal law, book club publishers are required to announce their monthly selections to members before shipping books under a negative option plan. In many cases, these announcements are made monthly. Virtually all negative option book clubs would thus be compelled to collect and remit sales tax on any books sold in North Dakota as a result of compliance with the dictates of Federal negative option requirements. The burden that North Dakota imposes on such publishers "bears no relationship to the taxpayer's presence or activities in [the] State" and constitutes "an undue burden on interstate commerce." *Commonwealth Edison Co. v. Montana*, 453 US 609, 629 (1981).

As use taxes on out-of-state publishers spread, the burden of compliance, particularly on smaller publishers, could force smaller-circulation publishers to abandon even attempting to sell in States where few subscribers reside. Such would be the ironic and unintended "fruits of civilization for which, as Mr. Justice Holmes was found of saying, we pay taxes."

Wisconsin v. J.C. Penney, 311 US 435, 446 (1941). More relevant to this case is Holmes's observation;

> For one in my place sees how often a policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end. *Law and the Court*, quoted in *Commonwealth Edison, supra*, 653 (Blackmun, dissenting).

III. IF THE LONG-STANDING AND WIDELY-ACCEPTED RULE IN *BELLAS HESS* IS TO BE CHANGED, IT SHOULD BE CHANGED BY CONGRESS EXERCISING ITS LEGISLATIVE POWERS UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

A decade ago, Justice White, expressing his concern over a tax that may be 'here and now unconstitutional'', decided that ''the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.'' *Commonwealth Edison, supra*, 638. We recommend that policy here.

The inequity of North Dakota's tax, encompassing practically any enterprise that might solicit any sales whatsoever is particularly odious. However, any judicial attempt to properly fashion an equitable tax on interstate sales may exceed the judiciary's proper function. This Court described the problem in *Commonwealth Edison:*

> In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation,

> and yet be reasonably capable of application in a wide variety of individual cases. 453 US 609, 628.

In the second place, Congress is the appropriate branch of the Federal government to consider and develop the solution to State taxes on interstate transactions. More than 30 years ago, following this Court's decisions in *Northwestern States Portland Cement v. Minnesota*, 358 US 450 (1959), Congress, concerned about inequitable results from multiple taxation of the same transaction, enacted Public Law 86-272, 77 STAT. 355. Congress's concerns in that instance were similar to the concerns expressed by sellers in this case: the lack of ''sufficient nexus,'' the heavy cost of compliance with a multitude of rules and regulations in thousands of taxing jurisdictions, and the probability that the ''economic implications for the economy of the entire Nation may be unfortunate.'' Senate Report 658, 86th Congress, p. 3 (1959).

Congress has held hearings and given consideration to legislation designed to permit State taxation of interstate sales, but has yet to propose a solution or disturb this Court's ''bright line'' drawn in *Bellas Hess*. The *amici* of this brief participated in those hearings. Congress's decision to consider the issue further, despite the urging of many State officials for immediate action, suggests that Congress perceives the problem to be far more complex than does, for instance, North Dakota. Until Congress exercises its legislative powers to change the limits of State authority in relation to interstate commerce, *Bellas Hess* should remain undisturbed.

CONCLUSION

Quill is an unusual case in which a State court has usurped the powers of the United States Supreme Court to overturn a well-settled rule of law. This despite the fact that the lower court itself claimed ''sufficient nexus'' — if it rises to that — in

Quill's ownership of computer software used by some of its customers to place orders — a tangible piece of property, perhaps not too thin a reed to support a demand that taxes be collected.

Underlying the lower court's decision, however is the grossly inequitable State statute upon which the decision was based, a statute that requires any seller to collect or pay taxes based on even the most incidental advertising within the States' border, and regardless of the volume of sales. Such a burden upon commercial activity denies due process of law and impermissibly invades Congress's exclusive powers over interstate commerce. We urge that this Honorable Court reverse the decision.

Respectfully submitted

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